No. 10-1125

Supreme Court, U.S.
FILED
APR 19 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DANIEL GUGGENHEIM, et al.,

Petitioners,

v.

CITY OF GOLETA, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF, *AMICUS CURIAE*, OF CALIFORNIA ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JUNE BABIRACKI BARLOW, ESQ.
Vice President and General Counsel
525 South Virgil Avenue
Los Angeles, California 90020
(213) 739-8200
juneb@car.org

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

		Page
I.	BRIEF OF *AMICUS CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITIONERS	1
II.	IDENTITY AND INTEREST OF *AMICUS CURIAE*	1
III.	CASE SUMMARY	3
IV.	GOLETA'S ORDINANCE GIVES THE LAND VALUE OF THE GUGGENHEIM'S PROPERTY TO THE COACH OWNERS WHEN THEY SELL THEIR UNIT	4
V.	GOLETA'S ORDINANCE INTERFERES WITH INVESTMENT BACKED EXPECTATIONS OF MOBILE HOME PARK OWNERS	7
VI.	GOLETA'S ORDINANCE VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT IS AN ILLEGITIMATE USE OF THE GOVERNMENT'S POLICE POWER: IT DOES NOT CONTROL HOUSING COSTS	10
VII.	CONFISCATORY RENT CONTROL SHOULD BE TREATED AS A FACIAL TAKING AS A MATTER OF PUBLIC POLICY	15
VIII.	CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Carson Harbor Vill. Ltd. v. City of Carson, 37 F.3d 468 (9th Cir. 1994) 11

Cashman v. City of Cotati, 124 F.3d 1150 (9th Cir. 1997) 8

Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009) 6

Guggenheim v. City of Goleta, No. 06-56306, 2010 WL 5174984 (9th Cir. Dec. 22, 2010) 2, 8, 10, 14

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 7, 11, 15

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 3, 6, 9

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 2, 7, 15

WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) 11

CONSTITUTIONAL PROVISION

U.S. Const. amend. V 15, 16

U.S. Const. amend. XIV 16

OTHER AUTHORITIES

Kenneth Barr, *The Right to Sell the "Im" mobile Manufactured Home in Its Rent Controlled Space in the "Im" mobile Home Park: Valid Regulation of Unconstitutional Taking?*, 24 URB. LAW. 157 (1992) 7

TABLE OF AUTHORITIES – Continued

Page

Werner Z. Hirsch and Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399 (1988) 7, 13

U.S. Department Of Housing And Urban Development, Report To Congress On Rent Control, p. 10 (1991) 12

I. BRIEF OF *AMICUS CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the California Association of REALTORS® (hereinafter C.A.R.)[1] submits this brief in support of the petitioners Daniel Guggenheim, Susan Guggenheim, and Maureen H. Pierce (collectively, the "Guggenheims").

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

C.A.R. is a voluntary trade association, and its members consist of local boards and associations of REALTORS® and more than one hundred seventy thousand (170,000) persons licensed as real estate brokers and salespersons by the State of California. REALTORS® assist members of the public in buying and selling real property.

As a representative of the real estate brokerage community which is involved in the sale of all properties, including mobile homes in mobile home parks,

---

[1] The parties have consented to the filing of this brief. The letters of consent are on file with the Clerk of the U.S. Supreme Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. The parties were notified of *amicus curiae's* intention to file and waived their right to a 10-day notice.

C.A.R. believes it can provide a unique and important perspective to this case.

For over one hundred years, C.A.R. has advocated protecting private property owners and preserving the alienability of real property. While C.A.R. also advocates for affordable housing, and has established a Housing Affordability Fund, this does not include confiscatory takings to accomplish that goal. In this case, the affordability goal is laudable but not achieved as the ordinance amounts to a transfer of wealth from the mobile home park landowner to the coach owner, particularly upon sale of the coach.

We have read the opinion issued on December 22, 2010 by the Ninth Circuit United States Court of Appeals[2] ruling *en banc* and believe that the court erred in its determination that the City of Goleta's ordinance does not amount to a facial regulatory taking. The dissent is correct when it stated that all three of the *Penn Central, infra,* factors weigh in favor of a finding that Goleta's ordinance is a regulatory taking, that Goleta's ordinance violates substantive due process, and that Goleta's ordinance is therefore unconstitutional.

As the last five years have shown, property values can fluctuate and government action that destabilizes these long held property rights further is in need of clarification. Many properties have

---

[2] *Guggenheim v. City of Goleta*, No. 06-56306, 2010 WL 5174984 (9th Cir. Dec. 22, 2010) (*en banc*), Pet. App. 1a.

transferred, both voluntarily and involuntarily in that time. The potential for larger forfeiture of rights upon transfer is an issue clearly in need of addressing for those in the Ninth Circuit. If the decision below holds, the principles in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), will be one more swath of shifting sands in California real estate. For all these reasons, we urge the Court to grant *certiorari*.

III. CASE SUMMARY

The procedural and case summary is presented in the petition for *certiorari* and we will not repeat it here except to highlight one aspect of the so-called "rent control." Goleta is a newly incorporated city on the outskirts of the highly desirable City of Santa Barbara located on the California coast. Locations near the coast have affordability issues and mobile homes are usually less costly than fixed structural housing. Presumably Goleta sought to protect lower housing costs by enacting a mobile home rent control ordinance.

While the City of Goleta's mobile home rent control ordinance capped the rate of annual rent the Guggenheims could charge for their mobile home lots, and capped land rent increases when a mobile home was sold to a new coach owner, the ordinance provided no cap on the amount mobile home owners could charge when leasing or selling the actual mobile home.

Since it is the land, not the coach, that escalates the price of housing in that situation, owners of coaches capture the land value when they sell their coaches at a premium. With coach sales prices unregulated, Goleta's ordinance effects a wealth transfer from the mobile home land owners to "windfall tenants" who sell their coaches. The ordinance is not written in such a way as to effect a legitimate state interest – such as providing affordable housing.

IV. GOLETA'S ORDINANCE GIVES THE LAND VALUE OF THE GUGGENHEIM'S PROPERTY TO THE COACH OWNERS WHEN THEY SELL THEIR UNIT

One can purchase mobile homes in a variety of fashions, each having a separate bundle of rights. Mobile homes can be located in mobile home parks in which the mobile home owner also owns the underlying land and the park provides common area property and services. Mobile homes can also be located in a park in which the park owner owns the land and the unit owner (the "unit" is sometimes called a "coach") leases the right to have the coach on the land. Other parks are designed for more transient uses and the mobile homes are usually referred to as recreational vehicles, though some may stay for many months in such a park. The Guggenheims own the second type of mobile home park: one in which the park owner owns the land and the coach owners own the unit. The coach owners may enter into long leases to protect their rents, or may have shorter term

leases. These are negotiated between the landowner and the tenant-coach owner. These land rents are what Goleta has sought to control.

Mobile home parks have different characteristics compared to typical residential rental properties. Unlike a typical lease where an exiting tenant has nothing to transfer to a new tenant, mobile home units are typically sold by the existing tenants to the new tenants. A private property transaction occurs between the current coach owner/park tenant and the subsequent coach owner/tenant. When the mobile home unit is sold, the lease in the mobile home park must be either assigned or renegotiated with the new coach holder and this is done simultaneously with the sale of the unit. But the Goleta ordinance interferes with this part of the land transaction by capping the amount the mobile home park owner can charge for use of the land. In desirable areas, this simply increases the sales price of the coach. This does not stabilize the cost of housing for those living in such mobile home parks, it enriches those selling their units.

Mobile home rent control creates distortions in the market for transactions between park owners and mobile home owners/park tenants, as well as for transactions between current and prospective mobile home owners/park tenants. In Goleta, it is estimated that the average value of a mobile home, but for the rent control, would be approximately $14,037. However, because of rent control, the average mobile home located on the Guggenheim's property sold for

$119,091. *Guggenheim v. City of Goleta*, 582 F.3d 996, 1019, n.14 (9th Cir. 2009), *en banc reh'g granted* (9th Cir. 2010). Thus, the mobile home unit owner enjoys a windfall by capturing the market value of the land when selling the mobile home unit.

Over time, Goleta's mobile home rent control, which starts out as a minor reduction in rent, leads to dramatic results. Given the structure of Goleta's rent control ordinance, the transfer of value from park owners to tenants will continue unabated in perpetuity.[3] As a result, the longer the period of time, the greater the transfer of wealth from the park owner to the park tenant such that eventually, proportionally almost all value will be transferred to the tenant. At some point, the wealth transfer will exceed 95% of the value of the property – it is only a matter of time. This slow erosion of the transfer of property rights is in contrast to an abrupt one: one is simply more difficult to decipher at the outset. Yet there should be no difference in the law's treatment of the two situations, particularly in light of the absence of a public purpose of lowering housing costs.

---

[3] The fact that this wealth transfer continues reinforces why the Ninth Circuit's interpretation of *Palazzolo* is in error, as more fully briefed by the petitioner.

V. GOLETA'S ORDINANCE INTERFERES WITH INVESTMENT BACKED EXPECTATIONS OF MOBILE HOME PARK OWNERS

In the seminal case of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this Court identified certain factors that need to be considered to determine whether a regulatory taking has occurred. *Penn Central* regulatory taking analysis requires the Court to consider the "economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment backed expectations." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-539 (2005), citing *Penn Central*, 438 U.S. at 124.

In the present case, the district court credited reports indicating that Goleta's rent control ordinance required the Guggenheims to rent the entire mobile home park at about an 80% discount below market rates, and 90% of the sale price of mobile homes in the park had been transferred to the incumbent tenants. Even though this finding is particular to this specific property, studies indicate that such redistribution by restrictive mobile home rent control ordinances is fairly standard. *See, e.g.*, Kenneth Barr, *The Right to Sell the "Im" mobile Manufactured Home in Its Rent Controlled Space in the "Im" mobile Home Park: Valid Regulation of Unconstitutional Taking?*, 24 URB. LAW. 157 (1992); Werner Z. Hirsch and Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399 (1988);

Cashman v. City of Cotati, 124 F.3d 1150 (9th Cir. 1997).

The Ninth Circuit, ruling *en banc*, agreed with the district court's finding that Goleta's ordinance does indeed transfer property values from park owners to tenants. *Guggenheim v. City of Goleta,* No. 06-56306, 2010 WL 5174984 at *5 (9th Cir. Dec. 22, 2010) (*en banc*). However, in order to find that Goleta's ordinance nevertheless does not have an unduly burdensome economic impact, the decision below asserts that because the ordinance was in place when the Guggenheims purchased the mobile home park, the ordinance could not have interfered with the Guggenheims' investment backed expectations. When the Guggenheims invested in the park, the Ninth Circuit concludes, they knew that the ordinance would limit their freedom to charge rent at market rates.

But land and laws values are not static. The Goleta ordinance is the one that keeps on giving . . . to the coach owners. The burdens of challenging a governmental regulation are great. The well-healed may mount a challenge so that their property rights may be protected as enforcing the constitutionally-backed expectations requires substantial investment as well. For the many who cannot survive this war of economic attrition, they forfeit their land values by selling to someone who hopes for, and can fund, the fight to stop the shifting of the value of their purchase to others indefinitely. Wiping out constitutional protections due to a purchase of the property gives

undue leverage to cities that ignore constitutional limits on regulatory takings of property.

The Ninth Circuit ignored the ways in which the ordinance *does* interfere with the investment backed expectations of the Guggenheims. As noted in the dissent, the majority disregards the Court's recent holding in *Palazzolo* that an investor can validly expect that a land control measure, in place when he invests, is not necessarily eternal and therefore does not disqualify his claim of regulatory taking. *Palazzolo v. Rhode Island,* 533 U.S. 606, 627 (2001). Justice Scalia, in his concurrence, is even more explicit,

> In my view, the fact that a restriction existed at the time the purchaser took title . . . should have *no bearing* upon the determination of whether the restriction is so substantial as to constitute a taking. The 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional.

Id. at 637 (Scalia, J., concurring) (*emphasis added*) (internal citation omitted).

In fact, the possibility that Goleta's ordinance might be repealed could easily have factored into the Guggenheim's investment backed expectations. The majority opinion even acknowledges this possibility by conceding that "[t]he Guggenheims might conceivably have paid a speculative premium over the value

that the legal stream of rent income would yield, on the theory that rent control might someday end, either because of a change of mind by the municipality or court action." *Guggenheim v. City of Goleta*, No. 06-56306, 2010 WL 5174984 at *5 (9th Cir. Dec. 22, 2010) (*en banc*). Such speculation by the Guggenheims would not have been unreasonable.

VI. GOLETA'S ORDINANCE VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT IS AN ILLEGITIMATE USE OF THE GOVERNMENT'S POLICE POWER: IT DOES NOT CONTROL HOUSING COSTS

The raw wealth transfer has no valid public purpose. While it keeps land rents low, it is not designed to control the ultimate cost of housing, nor does it achieve that end. As stated by the dissent,[4]

> . . . it decides the substantive due process and equal protection claims by citing rent control cases. *But, the Goleta ordinance is not a rent control law for the simple reason that it is not designed to – nor does it – control rents*. It does not just miss the mark because of unintended consequences or inefficient administration. Its very structure was designed and intended not to provide housing rent control, but to transfer wealth

---

[4] *Guggenheim v. City of Goleta*, No. 06-56306, 2010 WL 5174984 at *8 (9th Cir. Dec. 22, 2010) (en banc) (Bea, J., dissenting).

> from mobile home park owners to one group of lucky tenants. The measure we deal with here is a wealth transfer, pure and simple, with none of the features of rent control thought legitimate governmental interests. As such, its enforcement violates due process and equal protection. (*Emphasis added*).

In *Carson Harbor Vill. Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994), overruled on other grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (*en banc*), the United States Ninth Circuit Court of Appeals held:

> A generally applicable rent-control ordinance will survive a substantive due process challenge if it is *designed* to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances. . . . This deferential inquiry does not focus on the ultimate effectiveness of the law, but on whether the enacting body could have *rationally believed* at the time of enactment that the law would promote its objective. (*Emphasis added*).

The Supreme Court has not addressed this issue directly, and at least one justice has clearly indicated that whether or not a rent control ordinance can violate substantive due process remains an open question. *Lingle*, 544 U.S. at 548 (Kennedy, J., concurring). Even using the deferential Ninth Circuit test, the severe rent control regulation adopted by the

City of Goleta fails to meet the requirements of substantive due process.

The history of rent control on residential properties in general provides some insight into this issue. The goal of rent control has been to foster affordable housing by keeping rents in the community lower than otherwise, and also to create stability in housing prices for non-owners. In most cases, this results in wealth transfers as certain people (usually tenants) benefit at the cost of others (typically the landlords or owners). Under a typical residential rent control ordinance, tenants are able to lock in their rents at the prevailing market rates and are then able to keep cost increases at a reasonable rate following procedures laid out in the rent control regulations. In California, the experiment of rent control also included more restrictive types of rent control which were notorious in certain communities, such as Santa Monica, Berkeley, and West Hollywood, where the rents were set below market value even at the outset of the tenancy. Although these rent control ordinances prohibited the payment of "key money" (which was money that the new tenant paid to the past tenant for the opportunity to have a rent controlled unit), such payments still occurred regularly in highly restrictive rent control areas. *See, e.g.*, U.S. Department Of Housing And Urban Development, Report To Congress On Rent Control, p. 10 (1991).

Goleta's ordinance is a perfect example of how a rent control ordinance can work contrary to its stated purpose. In essence, Goleta's ordinance doesn't *really*

make mobile home housing more affordable. It is true that rents paid to park owners by the initial mobile home tenants are lower than market value. But when these lucky few sell their units, they capture the value of the land rents in the purchase. Therefore the purchase price of the mobile home from a previous owner is substantially inflated. New tenants have to prepay for their reduced rents.

Additionally, the high initial cost required to purchase a mobile home from a previous tenant means that fewer mobile home transactions will take place than in a market which has not been distorted by restrictive rent control. Potential buyers may lack the funds to pay such a steep premium up front, even though the transaction would make economic sense for them in the absence of an inflated purchase price. Essentially, this acts as a restriction on ownership transfers of real property that serves no legitimate purpose.

Furthermore, in areas where severe mobile home rent control provisions such as Goleta's have been passed, no new mobile home parks have been built since passage.[5] In fact, given the likelihood of greater returns on other real estate investments, over many years in areas with overly restrictive rent control ordinances, existing mobile home parks are likely to

---

[5] *See* Werner Z. Hirsch and Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399 (1988).

go out of business. It is textbook economics that, all else being equal, a reduction in supply will lead to an increase in price. Thus, Goleta's ordinance will ultimately make mobile home housing *less* affordable for non-owners by decreasing the supply of mobile home housing in the long run.

In sum, Goleta's ordinance has the following deleterious secondary effects, none of which promote the supposed goals of rent control: (1) it creates a premium on the purchase price of mobile homes acquired from previous owners; and (2) it reduces the supply of mobile home housing in Goleta, which leads to price increases for prospective buyers. These secondary effects essentially wipe out any beneficial primary effects that the ordinance might have.

The ordinance as adopted was a way to give incumbent mobile home owners an unearned windfall at the expense of park owners and potential mobile home owners. This was an illegitimate use of government power. As stated in the Ninth Circuit *en banc* dissent, "[w]hile the government has authority to tax or encumber citizens for the common good, it cannot violate individual rights merely to enrich a small, private interest group." *Guggenheim v. City of Goleta,* No. 06-56306, 2010 WL 5174984 at *17 (9th Cir. Dec. 22, 2010) (*en banc*) (Bea, J., dissenting).

VII. CONFISCATORY RENT CONTROL SHOULD BE TREATED AS A FACIAL TAKING AS A MATTER OF PUBLIC POLICY

Beyond an analysis using the *Penn Central* factors or substantive due process, certain policy considerations also argue for the idea that rent control which lacks vacancy decontrol should be treated as a facial regulatory taking. The whole concept behind the Takings Clause of the Fifth Amendment to the U.S. Constitution is "that private property shall not 'be taken for public use, without just compensation.'" *Lingle*, 544 U.S. at 536. The courts have made a broad distinction between the physical occupation of property by the government and regulatory confiscation of property, but landowners see both of these situations as equally interfering with the lawful use of their property. Although the government should be allowed some flexibility in order to promote zoning and other legitimate interests, at some point regulatory control becomes as severe (or even more severe) as the physical occupation of the property. No one is arguing for a standard which makes *any* government regulation suspect to challenge, but at some point courts must conclude government regulations go too far even though they do not prohibit *all* economic use of the property.

A number of opinions have suggested that such examination by the courts will open up the floodgates to challenges of government regulations and that the courts are not the proper forum for assessing whether regulations are effective or ineffective. However,

these fears can be allayed with clear guidance about when regulations do indeed go too far. Such guidance will not assess the effectiveness of regulations, but instead will simply determine whether or not a regulation violates individual constitutional rights.

It is in this context that extreme rent control ordinances should be examined. Goleta's mobile home rent control ordinance continues to transfer wealth and value from the park owner to the tenants, gradually yet insidiously. If instead of a gradual transfer, redistributions were made at one time from the park owner to the tenants as a lump sum payment (i.e. park owners were required to pay each tenant $90,000), landowners would certainly have redress in the courts. The advantage of time may make the redistribution more survivable by the park owner and less evident to the public, but it does not hide the fact that the government has made a confiscatory taking of property for which some compensation is due, or which can be remedied by striking down the regulation.

VIII. CONCLUSION

The Ninth Circuit *en banc* dissent, which argued that ordinances such as Goleta's violate the Fifth and Fourteenth Amendments to the Constitution, is the guidance needed to solidify and prevent future unwarranted takings. Even though the mobile home park owner might be receiving some return from the initial investment, the nature of a severe rent control

restriction absent vacancy decontrol ultimately amounts to a near complete exaction of the property owner's economic interest, given enough time. Such ordinances constitute *facial* takings of the property, even if the value is not taken immediately upon the law's enactment.

For all these reasons, the *amicus curiae* urges the Court to grant the *writ of certiorari*.

Respectfully submitted,

JUNE BABIRACKI BARLOW, ESQ.
Vice President and General Counsel
525 South Virgil Avenue
Los Angeles, California 90020
(213) 739-8200
juneb@car.org